Supreme Court, U.S.
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NO. 88-1711

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DONALD PRUESSMAN, Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ, M.D.; MICHAEL ROBINSON, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal court action was properly dismissed where petitioner filed both a state and federal court action arising out of the same incident, where both proceedings sought relief under state law and 42 U.S.C. Section 1983, where petitioner obtained jurisdiction over defendants in the state court action first and pursued discovery in the state court action, where petitioner "egregiously failed to prosecute" the federal court case and dismissal would avoid piecemeal litigation.

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OTHER AUTHORITIES:

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STATEMENT OF THE CASE[1]

On May 28, 1986, the day the statute of limitations ran, petitioner filed two complaints, one in the Eleventh Judicial Circuit in and for Dade County, Florida, and the other in the United States District Court, Southern District of Florida. (A.2-3). Both the state court and federal court actions arose from petitioner's confinement in the Community Health Center of South Dade. (A.2-3). In both actions plaintiff sought relief under both state law and 42 U.S.C. Section 1983. (A.2-3)

Plaintiff perfected service on all defendants in the state court action by

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[1]/ Throughout this brief, the symbol "A" will stand for the Petitioner's Appendix.

the middle of April, 1987, and discovery proceeded in that action. (A.2-4). On the otherhand, plaintiff merely issued summonses and did not obtain service on any of the defendants in the federal proceeding. (A.3). The federal action remained dormant for the following sixteen (16) months (until October 2, 1987) while the state action was vigorously pursued. (A.3-4, 9-10). The district court sua sponte issued an order on October 2, 1987 to show cause why the case should not be dismissed. (A.9-10). Plaintiff responded and on November 24, 1987 the court quashed its order to show cause and directed plaintiff to effect service upon all parties within forty-five (45) days. (A.11-22).

Plaintiff filed an amended complaint in the federal proceeding on January 6, 1988 alleging counts for civil rights violation under 42 U.S.C. Section 1983, conspiracy, assault and battery, false imprisonment, and a prayer for declaratory relief. (R.1-5). In January, 1988, plaintiff finally obtained service on some of the defendants nineteen (19) months after the filing of the action. (A.3-4). No discovery was ever undertaken in the federal court action.

The served defendants moved to dismiss the federal court action on various grounds. (A.6).

The district court entered an order dismissing plaintiff's state claims on January 28, 1988 (from which no appeal was

taken) and thereafter entered another order on February 8, 1988 dismissing the remaining Section 1983 claim and prayer for declaratory relief. (A.6-8, 23-24). The district court held that plaintiff elected to pursue his remedies in state court as evidenced by his "egregious failure" to prosecute the case. (A.6-7). Plaintiff appealed to the United States Court of Appeals, Eleventh Circuit after the district court's denial of plaintiff's motion to vacate order of dismissal. (A.42).

On December 19, 1988, the Eleventh circuit issued its unpublished opinion affirming the district court and stated in relevant part:

> [O]ur evaluation of the factors listed in Colorado River and Moses H. Cone establish that its order of dismissal does not require reversal. ... In reaching this decision we have given particular weight to the progress of the litigation in state court and the exceptional circumstances constituting Pruessman's "egregious failure to prosecute this case."

(A.5).

SUMMARY OF THE ARGUMENT

The district court acted within its sound discretion in dismissing the amended complaint. The district court decision is consistent with this Court's decisions in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). When the factors set forth in the two cases are applied to this case, it is clear that dismissal of the federal court action was proper.

Petitioner filed the state and federal court actions on the same day but chose to actively litigate the controversy only in

the state court action. Petitioner obtained jurisdiction over defendants in the state court action over eighteen months before any of the defendants were served in the federal court action. While the parties were served and discovery was undertaken in the state court action, petitioner "egregiously failed to prosecute" the federal court case.

The dismissal of the case will also avoid the potential for piecemeal litigation.

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ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED; THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT: (A) DIRECTLY AND APPARENTLY CONFLICT WITH DECISIONS OF THIS COURT; (B) INVOLVE IMPORTANT FEDERAL JURISDICTIONAL ISSUES; (C) CONFLICT WITH

ITS OWN DECISIONS; (D) CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS; (E) RAISE ISSUES OF IMPORTANCE TO THE PUBLIC.

The Petition for Writ of Certiorari should be denied. The decision of the Eleventh Circuit Court of Appeals does not conflict with any decision of this Court, the Eleventh Circuit or any other Circuit Courts of Appeal. The case does not raise any issue of importance to the public which has not been, but should be, settled by this Court.

First, the decision of the Eleventh Circuit is perfectly consistent with the decisions of this Court in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); and Moses H. Cone

Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In Colorado River, the United States Supreme Court reiterated the general rule that "the pendency of an action in state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction..." 424 U.S. at 817, 96 S.Ct. at 1246, quoting McClellan v. Carland, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed 762, 767 (1910). The Court held, however, that circumstances do exist which allow dismissal of a federal suit due to the presence of a concurrent state proceeding. As this Court opined in the decision, the reasons for permitting the dismissal are based on "considerations of '[w]ise judicial administration, giving

regard to conservation of judicial resources and comprehensive disposition of litigation.'" Colorado River Water Conservation District v. United States, 424 U.S. at 817, 96 S.Ct. at 1246, quoting Keortest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200, 203 (1952).

The decision of whether to defer to state courts is left to the discretion of the district court and requires the balancing of several factors including: "the absence of any substantial progress in the federal court litigation; the presence in the suit of extensive rights governed by state law; the geographical inconvenience of the federal forum;" the potential for piecemeal litigation; the adequacy of each forum to

protect the party's rights; the order in which jurisdiction was obtained by the concurrent forums; and whether one of the courts has assumed jurisdiction over the property in dispute.[2]

Clearly two factors are not present in this case. First, there is no property involved in the litigation so there was no assumption by either court of jurisdiction over any property. Second, the federal court is in close proximity to the state court so there is no contention that the federal forum is any less convenient than the state court.

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[2]/ Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. at 15-16, 103 S.Ct. at 936-937.

The remaining factors as applied to the facts of this case, however, strongly support the dismissal of the federal court action. First, jurisdiction over the defendants was obtained in state court nine months before any of the defendants were served in federal court. The Section 1983 claim was first perfected in state court over four months before service of the defendants in federal court. Even more important, substantial discovery was undertaken by the parties in the state court action and several motions were argued in that court. While the state court action was being actively litigated, the federal court action was not prosecuted. The Colorado River Court found the absence of any other proceedings in federal court other

than the complaint to be a significant factor in upholding the dismissal of the complaint. 424 U.S. at 820, 96 S.Ct. at 1248. Both the District Court and Circuit Court of Appeals noted the significance of the plaintiff's failure to prosecute the federal court action in reaching their respective decisions. (A.5, 7).

The dismissal of the case will also avoid the potential for piecemeal litigation. All claims based on state law were dismissed from the federal court action, and no appeal was taken from that order (A.23-24). On the otherhand, the actively pursued state court action is litigating both the state claims and the section 1983 claim.

Petitioner argues that the application of the principles in Colorado River and Moses

H. Cone Memorial Hospital decisions violates the spirit of Section 1983 legislation. However, this Court in Colorado River specifically noted that the principles allowing the dismissal of a federal action due to the presence of concurrent state proceedings "for reasons of wise judicial administration" are "unrelated to considerations of proper constitutional adjudication and regard for federal-state relations." 424 U.S. at 817, 96 S.Ct. at 1246. Here, the Colorado River principles are totally unrelated to considerations of proper adjudication under Section 1983. In any event, there is no question that "[t]he state court can award all relief available under the federal statutes." Young v. Board of Education, 416 F.Supp. 1139, 1141 (D.

Colo. 1976). Therefore, since the Federal Court has dismissed all claims based on state law, plaintiff can receive full and complete relief in state court and the federal forum is inadequate to protect plaintiff's rights.

Consequently, when the factors enunciated in the Colorado River and Moses H. Cone Memorial Hospital cases are balanced, it is clear that the dismissal of the federal court action was proper. There is no conflict between the Eleventh Circuit opinion and any decision of this Court or any other decision of a Circuit Court of Appeal. There is no basis for this Court to exercise its discretionary jurisdiction.

CONCLUSION

Based on the foregoing argument and authorities, respondent, GLENN FALK, respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

BY: Betsy E. Gallagher
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

I, Betsy E. Gallagher, a member of the Bar of this Court, certify that three copies of Respondent's Reply to Petition for Writ of Certiorari were served by mail, postage prepaid, this 23rd day of May, 1989, upon the following:

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